Supreme Court, U.S.
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No. 98-801

In The
Supreme Court of the United States
October Term 1998

HARRIMAN G. RADFORD,
Petitioner,

vs.

GENERAL DYNAMICS CORPORATION, et al.,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of
Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Jeffrey J. Wolf *
James R. Griffin
JACKSON WALKER L.L.P.
301 Commerce Street , Suite 2400
Fort Worth, Texas 76102
Telephone (817) 334-7200
Facsimile (817) 334-7290

Counsel for Respondents
Lockheed Retirement Plan for Certain
Salaried Employees and Retirement Plan
Committee of the Lockheed Retirement
Plan for Certain Salaried Employees
*Counsel of Record

December 14, 1998

QUESTION PRESENTED

Is the limitations period in ERISA § 413, 29 U.S.C. § 1113, tolled while a claimant exhausts administrative remedies where the statute makes no provision for such tolling?

PARTIES TO THE PROCEEDING

The Petition accurately lists the parties to this proceeding.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Harriman Radford retired from General Dynamics on January 6, 1989. On January 9, 1989, Radford "learned to his dismay" that information provided to him by General Dynamics was incorrect, and that by retiring a few months before his fifty-fifth (55th) birthday, he had suffered a "monumental reduction in his benefits." Instead of receiving $835.00 per month as he anticipated, Radford's pension was $301.00 per month. In 1989, Radford pursued and exhausted administrative remedies with the General Dynamics Plan years before he filed his lawsuit. After Lockheed purchased the Fort Worth Division of General Dynamics in 1993, Radford again filed an administrative claim which was denied on December 16, 1994. Radford filed this lawsuit alleging a Varity fiduciary breach claim on October 17, 1996.

In granting the Motion to Dismiss based on the statute of limitations, the District Court concluded that "the allegations contained in Plaintiff's First Amended Original Complaint make clear that the 'last action' which constituted a part of the breach or violation about which Radford complains occurred prior to January 9, 1989. Because Plaintiff's original complaint was not filed until October 17, 1996, his claims are barred by the six-year statute of limitations contained in 29 U.S.C. § 1113(a)(1)(A), [ERISA § 413]." (Appendix to Petition at 16a). Agreeing with the District Court that ERISA § 413 provides the applicable statute of limitations for Varity fiduciary breach claims, the Fifth Circuit Court of Appeals concluded: "Radford stated in his complaint that he 'learned to his dismay' that the information was incorrect on January 9, 1989. Thus Radford had actual knowledge of the breach on January 9, 1989, and under [ERISA] § 413 he had to file suit within three years. Further, the last act which constituted part of the breach occurred prior to January 9, 1989. Thus under either

the three year or six year limitations period, Radford's claim filed on October 17, 1996, is time-barred." Radford v. General Dynamics Corp., 151 F.3d 396, 399 (5th Cir. 1998).

While the Fifth Circuit "assumed without deciding" that exhaustion of administrative remedies is required before filing a Varity fiduciary breach claim, the Court further concluded that the six year limitations period set forth in ERISA § 413 is not tolled while a claimant exhausts administrative remedies. Id. at 400. The Court reasoned that ERISA § 413 is a "statute of repose, establishing an outside limit of six years in which to file suit and tolling does not apply." Id.

Judge Robert Parker dissented and questioned whether the Fifth Circuit should reexamine the issue of requiring exhaustion of administrative remedies in cases involving ERISA violations (as opposed to cases involving rights under a plan). Id. at 400 n.1. While Judge Parker also urged in the dissent that if exhaustion is required, then the statute of limitations should be tolled (Id. at 401), he denied the Suggestion for Rehearing En Banc on September 21, 1998. (Appendix to Petition at 18a, 19a).

REASON FOR DENYING THE WRIT

1. The issue of whether the statute of limitations set forth in ERISA § 413 is tolled while an ERISA claimant exhausts administrative remedies does not warrant review by the Supreme Court.

The Petition does not suggest a conflict among the circuits or even a conflict with relevant decisions of this Court. The only "compelling reason" cited for granting the Petition is that the Fifth Circuit Court of Appeals has decided an "important question of federal law" which should be settled by this Court. Although two legal issues were raised in this case--the applicable statute of limitations for an ERISA fiduciary breach claim and whether a

claimant must exhaust administrative remedies before filing a Varity fiduciary breach claim--neither of these issues is raised in the Petition. The only question presented in the Petition is whether the limitations periods set forth in ERISA § 413 should be tolled while an ERISA claimant exhausts administrative remedies.[1] The only bases for review by this Court cited in the Petition are public policy arguments, not the law. This Court need not look further than the statute to answer the question presented. ERISA § 413 provides:

> No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part, after the earlier of:
>
> (1) six years after (A) the date of the **last action** which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation; or
>
> (2) three years after the earliest date on which the Plaintiff had **actual knowledge** of the breach or violation.
>
> Except in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

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[1] This same question was presented in the Suggestion for Rehearing En Banc which was denied on September 21, 1998. (Appendix to Petition at 18a, 19a).

Where, as here, Congress has prescribed a specific limitations period, its mandate must be obeyed. See Holmberg v. Armbrecht, 327 U.S. 392, 395 (1946); Soriano v. United States, 352 U.S. 270, 276 (1957) ("Congress was entitled to assume that the limitations period it prescribed meant just that period and no more"). ERISA § 413 is specific as to when the statute of limitations begins to accrue: "the earlier of" six years after the "last action" which constituted a part of the fiduciary breach or violation or three years after the claimant has "actual knowledge" of the fiduciary breach or violation. 29 U.S.C. § 1113; Maher v. Strachan Shipping Co., 68 F.3d 951, 954 (5th Cir. 1995). As the Fifth Circuit correctly concluded, the language of ERISA § 413 "serves as an absolute barrier to an untimely suit." Radford, 151 F.3d at 400. See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 363 (1991) (similar provision of the Securities Exchange Act not subject to tolling). To conclude otherwise would read the "last action" and "actual knowledge" standards out of ERISA § 413. See Phillips v. Alaska Hotel & Restaurant Employees Pension Fund, 944 F.2d 509, 520 (9th Cir. 1991), cert. denied,504 U.S. 911 (1992). To subscribe to Radford's argument would nullify ERISA § 413 where a Plaintiff has not exhausted administrative remedies. See Walters v. Secretary of Defense, 725 F.2d 107, 114 (D.C. Cir. 1983).

Of course, the Petition does not mention public policy justifications which support enforcing the limitations periods set forth in ERISA § 413 as written.[2] Instead, the Petition cites public

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[2] It is well-established that statutes of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim, it is unjust to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 349 (1944).

policy arguments which purportedly favor tolling the statute. As set forth below, neither of these policy arguments merits review by this Court.

Radford's first policy argument in support of tolling the statute of limitations is "promoting judicial economy." (Petition at p. 6, 7). Radford argues that requiring an ERISA claimant to file suit within the deadlines set forth in ERISA § 413 will result in the claimant exhausting administrative remedies after suit is filed, with a corresponding waste of judicial resources. The problem with this argument is that it assumes that an ERISA claimant will wait until nearly three years after "actual knowledge" or nearly six years after the "last action" to commence pursuit of administrative remedies. By interpreting ERISA § 413 as it is written, the Fifth Circuit has provided a bright line test which not only encourages timely filing of lawsuits, but also prompt pursuit of administrative remedies. In the rare case where an ERISA claimant has not exhausted administrative remedies when the limitations deadline is about to run, district courts have the discretion to stay (rather than dismiss) a timely filed action pending exhaustion of administrative review where dismissal would otherwise prevent a claimant from filing suit before the limitations deadline. See, e.g., Evans v. Midland Enter., Inc., 704 F.Supp. 106, 108 (M.D. La. 1989); Greenblatt v. Budd Co., 666 F.Supp. 735, 744 (E.D. Pa. 1987). By staying an action until administrative review is complete, judicial resources are not wasted.

Radford's second policy argument for tolling the statute is avoiding "inequitable results." Radford argues that "[p]lans will be in a position to delay the final resolution of the beneficiary's complaint until the ERISA § 413 statute of limitations has expired." (Petition at p. 7). However, under the ERISA administrative claims regulations, 29 C.F.R. § 2560.503-1(e)(2) and (h)(4), an administrative claim is deemed denied after a total of 300 days have passed from the date the claim was filed. Radford, 151 F.3d at 400. In addition, as noted above, district

courts have the discretion to stay (rather than dismiss) an action where the claim is timely filed, but exhaustion of administrative remedies is not yet complete.

Moreover, Congress specifically addressed the issue of when the limitations period can be extended to avoid "inequitable results." In the case of fraud or concealment of a fiduciary breach or violation, ERISA § 413 explicitly provides that the limitations deadline is extended six years after "discovery" of the fiduciary breach or violation. 29 U.S.C. § 1113. However, as is evident from the statutory language, Congress did not provide that the statute is tolled while a claimant exhausts administrative remedies.

Other circuits which have addressed the tolling issue have reached the same conclusion. The District of Columbia Court of Appeals concluded: "the special provision Congress made elsewhere in [ERISA § 413] for fraud or concealment . . . provides amelioration in the worst cases while, at the same time, indicating that Congress meant to toll the statute [only] in instances of fraud or concealment . . . . The limitations period in [ERISA § 413] . . . suggests a judgment by Congress that . . . the value of repose will trump other interests, such as a Plaintiff's right to seek a remedy." Larson v. Northrup Corp., 21 F.3d 1164, 1171-72 (D.C. Cir. 1994). In like manner, the Seventh Circuit Court of Appeals expressed doubt about whether ERISA § 413 can be equitably tolled. Wolin v. Smith Barney, Inc., 83 F.3d 847, 850 (7th Cir. 1996) ("The explanation may be that Congress decided to substitute a fixed period of years for the open-ended judge-made doctrines of fraudulent concealment and equitable estoppel, thus promoting (as in statutes of repose) certainty of legal obligation."). Accord Landwehr v. DuPree, 72 F.3d 726, 732-33 (9th Cir. 1995) (recognizing that ERISA § 413 addresses ERISA Defendants' "interest in repose").

Finally, it should be noted that any inequitable result in this case is purely hypothetical. Radford's pleading established

that he knew about any fiduciary breach on January 9, 1989, that the "last action" constituting a part of the breach or violation occurred before January 9, 1989, that Radford immediately commenced pursuit of administrative remedies, and that Radford exhausted administrative remedies for a second time on December 16, 1994. Given that Radford alleges that he had actual knowledge of any reduction of benefits as of January 9, 1989, the "harmful consequences" were "obvious," expert opinions were unnecessary, and legal consultation was not required. See Kurz v. Philadelphia Elec. Co., 96 F.3d 1544, 1551 (3d Cir. 1996), cert. denied, 118 S. Ct. 297 (1997). No explanation is provided in Radford's pleading as to why he did not file his lawsuit on or before January 9, 1995 when the six year statute expired or why he waited until October 17, 1996 to do so. The fact that Radford exhausted administrative remedies prior to the expiration of the limitations deadline is no excuse for his failure to timely file his lawsuit. The District Court and Fifth Circuit Court of Appeals correctly applied ERISA § 413 to the facts of this case. Further review by this Court is not warranted.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Dated December 14, 1998.

Respectfully submitted,

Jeffrey J. Wolf
James R. Griffin
JACKSON WALKER, L.L.P.
301 Commerce Street, Suite 2400
Fort Worth, Texas 76102
Telephone (817) 334-7200
Facsimile (817) 334-7290

Counsel for Respondents
Lockheed Retirement Plan for Certain Salaried Employees and Retirement Plan Committee of the Lockheed Retirement Plan for Certain Salaried Employees